

levels 42 and 28. The applicable base offense level at § 2K1.3 is level 12. The base offense level of level 12 appears to be disproportionately low compared with other 20 year offenses and compared with the treatment of 18 U.S.C. 842(p)(2) offenses under § 2M6.1. This is especially true in light of the definition of destructive device, defined at 18 U.S.C. 921(a)(4) to include any explosive, incendiary, or poison gas (1) bomb; (2) grenade; (3) rocket having a propellant charge of more than four ounces; (4) missile having an explosive or incendiary charge of more than one-quarter ounce; (5) mine; or (6) device similar to any of the devices described in the preceding clauses.

The amendment makes the enhancement at § 2K1.3(b)(3) and the cross reference at § 2K1.3(c)(1) applicable to 18 U.S.C. 842(p)(2) offenses. In cases in which the defendant used or possessed any explosive material in connection with another felony offense or possessed or transferred any explosive material with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, subsection (b)(3) provides a four level enhancement and a minimum offense level of level 18. Alternatively, the cross reference at subsection (c)(1) references such cases either to § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Guideline)), or to the most analogous homicide guideline if death resulted, if the resulting offense level is greater. Application of both subsection (b)(3) and subsection (c)(1) to 18 U.S.C. 842(p)(2) offenses is appropriate because of the defendant's knowledge and/or intent that the defendant's teaching would be used to carry out another felony.

5. Amendment: Part C of Chapter Two and §§ 3D1.2 and 5E1.2, effective January 25, 2003 (*see* USSC Guidelines Manual Supplement to the 2002 Supplement to Appendix C, Amendment 648), are repromulgated without change. Appendix A, effective January 25, 2003 (*see* USSC Guidelines Manual Supplement to the 2002 Supplement to Appendix C, Amendments 647 and 648; *see* also this document, Amendment 2), is repromulgated without change.

Reason for Amendment: The Commission promulgated an emergency amendment addressing the directive from Congress contained in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, (the "BCRA"), with an effective date of January 25, 2003. (*See* Amendment 648.) This amendment repromulgates without

change the emergency amendment as a permanent amendment.

This amendment implements the directive from Congress contained in the BCRA to the effect that the Commission "promulgate a guideline, or amend an existing guideline * * *, for penalties for violations of the Federal Election Campaign Act of 1971 [the "FECA"] and related election laws * * *." The BCRA significantly increased statutory penalties for campaign finance crimes, formerly misdemeanors under the FECA. The new statutory maximum term of imprisonment for even the least serious of these offenses is now two years, and for more serious offenses, the maximum term of imprisonment is five years.

To punish these offenses effectively, the Commission chose to create a new guideline at § 2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property). The Commission opted against simply amending an existing guideline because it determined after review that the characteristics of election violation cases did not bear sufficient similarity to cases sentenced under any existing guideline. The offenses that will be sentenced under § 2C1.8 include: violations of the statutory prohibitions against "soft money" (2 U.S.C. 441i); restrictions on "hard money" contributions (2 U.S.C. 441a); contributions by foreign nationals (2 U.S.C. 441e); restrictions on "electioneering communications" (as defined in 2 U.S.C. 434(f)(3)(C)); certain fraudulent misrepresentations (2 U.S.C. 441h); and "conduit contributions" (2 U.S.C. 441f).

The new guideline has a base offense level of level 8, which reflects the fact that these offenses, while they are somewhat similar to fraud offenses (sentenced under § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States)) at a base offense level of level 6), nevertheless are more serious due to the additional harm, or the potential harm, of corrupting the elective process.

The new guideline provides five specific offense characteristics to ensure appropriate penalty enhancements for aggravating conduct that may occur

during the commission of certain campaign finance offenses. First, the new guideline provides a specific offense characteristic, at § 2C1.8(b)(1), that uses the fraud loss table in § 2B1.1 incrementally to increase the offense level in proportion to the monetary amounts involved in the illegal transactions. This both assures proportionality with penalties for fraud offenses and responds to Congress' directive to provide an enhancement for "a large aggregate amount of illegal contributions."

Second, the new guideline provides alternative enhancements, at § 2C1.8(b)(2), if the offense involved a foreign national (two levels) or a foreign government (four levels). These enhancements respond to another specific directive in the BCRA and reflect the seriousness of attempts by foreign entities to tamper with the United States' election processes.

Third, the new guideline provides alternative enhancements of two levels each, at § 2C1.8(b)(3), when the offense involves either "governmental funds," defined broadly to include federal, state, or local funds, or an intent to derive "a specific, identifiable non-monetary Federal benefit" (e.g., a presidential pardon). Each of these enhancements responds to specific directives of the BCRA.

Fourth, the new guideline provides a two level enhancement, at subsection (b)(4), when the offender engages in "30 or more illegal transactions." After a review of all campaign finance cases in the Commission's datafile, the Commission chose 30 transactions as the number best illustrative of a "large number" in that context. This enhancement also responds to a specific directive in the BCRA to the effect that the Commission provide enhanced sentencing for cases involving "a large number of illegal transactions."

Fifth, the new guideline provides a four level enhancement, at § 2C1.8(b)(5), if the offense involves the use of "intimidation, threat of pecuniary or other harm, or coercion." This enhancement responds to information, received from the Federal Election Commission and the Public Integrity Section of the Department of Justice, which characterizes offenses of this type as some of the most aggravated offenses committed under the FECA.

The new guideline also provides a cross reference, at subsection (c), which directs the sentencing court to apply either § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate,